UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

GRAYMONT PA, INC.

and **Case** 6-CA-126251

LOCAL LODGE D92, UNITED CEMENT, LIME, GYPSUM AND ALLIED WORKERS, A DIVISON OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT GRAYMONT PA, INC.'S ANSWERING BRIEF IN OPPOSITION TO GENERAL COUNSEL'S LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by:

Dalia Belinkoff
Counsel for the General Counsel

NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel respectfully files this reply brief to Respondent Graymont PA, Inc.'s Answering Brief in Opposition to General Counsel's Limited Exceptions to the Decision of the Administrative Law Judge. General Counsel excepted to the Administrative Law Judge's failure to find that Respondent violated Section 8(a)(1) and (5) of the Act by its unreasonable delay in notifying the Union that it had no information relevant to the Union's request.

In its Answering Brief, Respondent contests General Counsel's argument that the issue was fully litigated at hearing, noting in part that no witnesses testified or were questioned regarding the reasons or circumstances surrounding the delay in simply notifying the Union that Respondent had no documents responsive to the Union's request. Counsel for the General

Counsel submits that, in fact, the issue was litigated, and Respondent was fully aware of the litigation stance and evidence to be provided at hearing.

Respondent's Amended Answer (GCX-1(k) Par. 12)[1], filed on the eve of trial, averred affirmatively that Respondent had no duty to provide the requested information, and that it had no information relevant to the Union's request. Thus, Respondent squarely placed the allegation in issue. Further, at hearing, Respondent was put on notice that the underlying issues were not appropriate for deferral due to the information request (9), and Respondent again responded that it had no duty to provide information, notwithstanding its late averment that it had no information (12-13).

Union President Dan Ripka testified that he was informed for the first time in late August, 2014, that the Employer had no information responsive to the Union's request (66). He testified as well that in response to the Union's request for information underlying Respondent's changes to the absentee policy, Respondent's Manager Martin Turecky told the Union that 3% of the employees abused the absentee policy (37).

Turecky testified on direct examination that he had received the information request, and had responded by letter of February 25, 2014 (82, JX-7). In that response, Respondent refused to provide any information claiming only that it had no obligation to do so. At hearing, Turecky testified that he had not relied on nor reviewed any documents with respect to the rules and policy changes at issue (83). When questioned on cross examination about his remarks concerning an absenteeism abuse rate of 3%, Turecky testified that he could not recall making that statement (89).

Respondent's testimony demonstrates that Respondent had the opportunity and did in fact fully defend the allegation that it unreasonably delayed in informing the Union that there was no information responsive to the Union's request. Respondent chose to more fully defend

[1] GCX refers to General Counsel Exhibits; numbers in parentheses refer to pages of the official transcript.

its failure to provide information by providing evidence to support its argument that it had no duty to provide information.

Thus, Counsel for the General Counsel submits that Respondent was fully aware of the implications of its Amendment to its Answer to Complaint, and fully litigated the underlying information allegation, which was its failure and/or delay in providing any answer to the Union. As argued previously, Respondent was clearly attempting to sever the Complaint allegations so that the information issue would stand alone, and the issue of the changes to bargaining unit employees' terms and conditions of employment would be deferrable to the grievance and arbitration machinery. As argued previously, such subterfuge should not be rewarded by the procedural stumbling block encountered in *Raley's Supermarket and Drug Centers,* 349 NLRB 26 (2007).

Respondent further argues that there is no basis to overrule *Raley's Supermarket and Drug Centers,* 349 NLRB 26 (2007). In *Raley's*, the Board held that the failure of General Counsel to specifically plead that Respondent had NO (emphasis added) information responsive to a Union's request, rendered the pleading of failure or delay in providing such information, ineffective to establish a violation of the Act.

Counsel for the General Counsel submits that *Raley's* is improperly decided, and should be overruled. Counsel for the General Counsel submits that *Raley's* conflates improper pleading practice before the Board, with substantive Board law.

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiation and administration. See, e.g. *A-1 Door & Building Solutions,* 356 NLRB No. 76 slip op at 2 (2011). Thus, upon request, an employer has the legal duty to furnish its employees' bargaining agent with information relevant and necessary to the performance of its statutory duties. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967). The Board and the courts have consistently found that an unreasonable delay in furnishing relevant and necessary information is as much a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. See, e.g. *Comar, Inc.,* 349 NLRB 342 (2007).

Section 102.15 of the Board's Rules and Regulations requires only that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices. . . " Applying this rule, the Board and the courts have consistently found that an unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different legal contexts. As the Sixth Circuit stated over 60 years ago:

> The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense. *In re Artesia Ready Mix Concrete, Inc.*, 339 NLRB No. 159 (2003), citing *NLRB v. Piqua Munising Wood Products Co.,* 109 F. 2d 552, 557 (6th Cir. 1940)

In holding that an allegation of failure or delay in providing information is substantively different from an allegation of failure to state there is NO information, the Board went astray. To support the holding in *Raley's* that Respondent met its obligation to provide information under Section 8(a)(5) of the Act, the Board altered its long-standing policy with respect to notice pleading. The Board's holding in *Raley's* upends the employer's obligation to timely furnish relevant information. As then-Member Liebman noted, "the duty to bargain encompasses not only the duty to furnish relevant information, but also the duty to furnish such information in a timely manner." *Raley's* at 29.

Respondent in the instant case was clearly on notice of the alleged unlawful activity with respect to information. There is no meaningful difference between failure or delay in providing information which does exist, and failure or delay in providing the response that NO information exits. Accordingly, Counsel for the General Counsel submits that to follow the holding of

Raley's under the circumstances of this case encourages employers to manipulate the law and the Act, and it should not be applied herein.

Based on the above, Counsel for the General Counsel respectfully requests that the Board reconsider its decision in *Raley's* and find that Respondent violated Section 8(a)(1) and (5) of the Act with respect to its delay in informing the Union that it had no information responsive to the Union's request. Further, Counsel for the General Counsel respectfully requests that the Board amend the Administrative Law Judge's Order and Notice to comport with such a finding.

Dated at Pittsburgh, Pennsylvania, this 6th day of March, 2015

Respectfully submitted,

/s/ Dalia Belinkoff

Dalia Belinkoff
Counsel for the General Counsel
NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222-4111